OPINION
72-441

February 24, 1972 (OPINION)

Mr. Byron L. Dorgan

State Tax Commissioner

RE: Taxation - Sales Tax - Indian Reservations

This is in response to your letter in which you state that uncertainties exist whether or not retailers located within the boundaries of an Indian reservation must charge sales tax on some or all of the retail sales made by them and pay the tax to the state. You then ask for an opinion on the following questions:

1. Is a non-Indian retailer whose place of business is located within the boundaries of an Indian reservation and on 'trust land,' as that term is explained above, required to charge North Dakota retail sales tax and pay the tax to the state on retail sales made to:

   a. A non-Indian

   b. An Indian

   c. An Indian tribe or band

2. The same question as in number 1, except that the non-Indian retailer's place of business is located on 'deeded land' as that term is explained above.

3. Is an Indian retailer whose place of business is located within the boundaries of an Indian reservation and on 'trust land,' as that term is explained above, required to charge North Dakota retail sales tax and pay the tax to the state on retail sales made to:

   a. A non-Indian

   b. An Indian

   c. An Indian tribe or band

4. The same question as in question number 3, except that the Indian retailer's place of business is located on 'deeded land' as that term is explained above."

The Sales Tax Act is contained in Chapter 57-32.2 of the North Dakota Century Code. It is an excise tax imposed upon gross receipts of retailers on all sales except those exempt from the Act, either by exclusion or exemption.

Initially we must recognize that the Act itself makes no distinction between sales, either on or off the Indian reservation.

In examining the various definitions, we do not find that the Legislature even remotely excluded sales to Indians either on or off the reservation from the Act. Under the exemptions (Section 57-39.2-04) we find no provisions which exempts sales to Indians, either on or off the reservation. Any exemption would have to rest on the provisions of subsection 1 of Section 57-39.2-04 which exempts "gross receipts from sales of tangible personal property which this state is prohibited from taxing under the Constitution or laws of the United States or under the constitution of this state."

In order to determine whether or not the state is prohibited or permitted to impose a sales tax on Indians either on or off the reservation, it is necessary to examine some of the laws which created the state of North Dakota and what rights were granted, reserved or secured under such laws as same relate to Indians.

The first document which may have application is the one known as the Organic Law - an act of March 2, 1861, Chapter 86, 12 Statutes at Large, 239. This is an act which pertained to the Territory of North Dakota. This Act among other things provided:

> "That nothing in this Act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Dakota, until said tribe shall signify their assent to the President of the United States to be included within the said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this Act had never passed:"

The next instrument that needs to be examined is the Enabling Act approved February 2, 1889, known as Chapter 180, United States Statutes at Large, 676. This Act in essence provides for the division of the Dakota Territory into two states and to admit same into the Union "on an equal footing with the original states, and to make donations of public lands to such states."

Section 4 of the Act contains the following language:

> " * * * The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

In the second paragraph of Section 4, we also find the following provision:

> "That the people inhabiting said proposed states do agree and

> declare that they forever disclaim all right an title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by an Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; * * * But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the land thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such act of Congress may prescribe."

The second session of the Sixty-first Congress in 1910 by Chapter 264, 36 Statutes at Large, 455, opened certain lands within the Fort Berthold reservation for homesteading. The Act also allocated by allotments certain number of acres to Indians living on the reservation. The Act authorized certain lands to be set aside for homesteading and townsite purposes. This was done. The Act in question and its effect, particularly whether or not it diminished or left the boundaries as they were when the initial reservation was created came before the United States District Court, Judge Register, who held that the boundaries were not diminished or altered. The decision was appealed to the United States Court of Appeals for the Eight Circuit Court and on January 17, 1972, it affirmed the decision of the District Court.

The net result of this litigation at this point is that the boundaries of the Fort Berthold Indian Reservation were not changed or altered as a result of the Homestead Act of 1910.

Under the Homestead Act of 1910, some lands became deeded lands and many non-Indians acquired real property as a result of said Act.

We are reliably informed that the townsite of New Town with the exception of one lot is on deeded land. For the purposes of this opinion, we are assuming that the land in the townsite of New Town is all deeded, particularly that upon which retailers are conducting their business. We are informed that the one lot which is not deeded is used as a site for an Indian agency type program and is not involved in the retail sale of any material.

The provisions of the Organic Law and the enabling legislation which became part of the North Dakota Constitution pertained primarily to the exemption of Indian trust land from taxation, and the right of the Indians to govern themselves under such terms and conditions as are contained in the treaties and by acts of Congress from time to time. We are not concerned here with the taxation of lands, but merely whether or not the sales to Indians are subject to the Sales Tax Act.

Basically, the Organic Law and enabling legislation in essence constituted a disclaimer of title to those lands.

The principles announced in the early case of M'Culloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579, apparently gave rise to the proposition that Indian reservations are an instrumentality of the United States government and as such the activities of the Indians and of the federal government on such reservations are not subject to any state tax. The holdings of the M'Culloch case by contention have been distorted and have been erroneously extended to include every conceivable relationship of the individual Indian to the governmental agency or Indian reservation. Initially, it was even argued with some success that employees of the federal government were not subject to state income tax. However, subsequent refinements of the M'Culloch case, particularly in Mark Graves v. the People of the State of New York, 306 U.S. 466, 83 L.Ed. 927, held that the original theory that a tax on income is legally or economically a tax on its source was not longer tenable and that employees of a federal agency were required to pay state income tax in the state in which they were employed. A similar conclusion was reached in Helvering v. Mountain Producers Corporation, 303 U.S. 376, 82 L.Ed. 907, with reference to a contractor who is employed or performs services for a governmental agency. The court here indicated that the prohibition against taxing a governmental instrumentality is only where it is a direct burden, but did not apply where the results of the tax were remote. It specifically held that contractors engaged in carrying on a government enterprise may be taxed.

It is well-settled law now that employees of the federal government are not exempt from state income tax if they are employed in that state. Conversely, it is well-established law that the federal government may impose a federal income tax on employees of a state.

Nevertheless, the erroneous construction and extension of the M'Culloch case is often urged with reference to taxation of Indians.

While Indians may in a sense be wards of the United States government, they are not the instrumentality itself and would be subject to the tax in the same manner as employees of a federal agency.

Briefly referring back to the Organic Law and the enabling legislation under which North Dakota acquired statehood, the North Dakota Supreme Court in State ex rel. Baker v. Mountrail County in 1914, 149 N.W. 120, held that all jurisdiction not expressly reserved to the Congress of the United States over the lands in question (Fort Berthold Indian Reservation) were relinquished to the state for the purpose of exercising political and governmental functions of such territory. The Court specifically said:

> "In conclusion, we entertain no doubt upon the proposition that the state rightfully exercises political and governmental jurisdiction and control over such lands vested in it by the Congress of the United States, sufficient to authorize it to include such territory within its political subdivisions for political and governmental purposes."

Thus, it may be observed that the Fort Berthold Reservation is actually a part of the state of North Dakota. As such, it is also part of the state of North Dakota. As such, it is also part of the counties in which the area is located. It is not a separate enclave or separate nation within the state of North Dakota.

The state of North Dakota under the Enabling Act when it was admitted to the Union came in on equal footing with all other existing states. Each state was and is to be competent to exert that residuum sovereignty not delegated to the United States by the Constitution itself. See Coyle v. Oklahoma, 221 U.S. 559. North Dakota is no exception to this concept.

We will be the first to recognize that the Indians are entitled to reparations for the damages inflicted upon them many years ago, but it was not the state of North Dakota that did the injury or that inflicted the damages. Those acts were performed and were completed prior to the time that this state became a member of the Union. It would necessarily follow that any repartions due remain the obligation of the United States and not of an individual state or the state of North Dakota which played no role in the activities and relations to and with the Indians at that time. Conceivably, the United States government could have established reservations elsewhere, but only as same may have application on other principles of law mentioned later herein.

The Indians in North Dakota have become citizens of this state by virtue of the Fourteenth Amendment to the United State Constitution and since then have been made eligible as electors of this state. They, as electors, have a voice to determine and select who shall represent them in the Legislative Assembly in the state of North Dakota which enacts the laws, including the tax laws. Also, the Equal Protection Clause of the Fourteenth Amendment would prohibit different treatment based on race. The Indians are entitled to and do receive welfare benefits through the North Dakota program which is in part financed by sales and use taxes, income tax and property taxes. The Indians are also entitled to educational benefits furnished by the state of North Dakota. All of these programs are in part supported with moneys derived from the sales tax. It is a common accepted concept that he who receives the benefits should also share in the obligation.

More recently, the question of whether or not Indians are subject to sales or income taxes has been resolved on the question whether the imposition of such tax interferes with the tribal right of self-government. The state of Minnesota in the case of Commissioner of Taxation v. Bruin, 174 N.W.2d. 120, held that the imposition of an income tax did interfere with the tribal right of self-government and held that the state of Minnesota could not impose such tax. This was in 1970.

The state of Arizona in the case of McClanahan v. State Tax Commission, 484 P. 2d. 221 (1971) reached the opposite result. (This is now on certiorari to the United States Supreme Court.) If we were to apply the rationale of the Minnesota case, we could come to the conclusion that the United States government should not be able to

collect an income tax from state employees because by so doing, inferentially, it would interfere with self-government of the state of North Dakota. This statement, of course, could not stand scrutiny. The court in the McClanahan case did consider the Minnesota case, but concluded that the imposition of an income tax on Indians for income earned within the reservation is not an infringement of the right of self-government by the tribe of which the taxpayer is a member and therefore held that the income tax was to be paid by the Indian and that it was a valid exercise of state law within the confines of the Indian jurisdiction.

We are impressed by the reasoning of the Arizona Supreme Court in the McClanahan case.

A similar conclusion was reached in the case of Ghahate v. Bureau of Revenue, 451 P. 2d. 1002. The court specifically held that an income tax on Indians did not interfere with self-government of Indian reservations and that the state had authority to impose such law.

The United States Supreme Court in Warren Trading Post Company v. Arizona State Tax Commission, 308 U.S. 685, 14 L.Ed.2d. 165, held that the Arizona Sales Tax Act did not apply to Warren Trading Post Company who was doing a retail trading business with the Indians on the Navajo Indian Reservation. Significantly, the court reached its conclusion not on the basis that it would interfere with self-government of the tribe, but rather on the basis that the Buck Act, 4 USCA 105-110, covered trade with the Indians. The Buck Act, together with its regulations regulated trade and intercourse with Indian tribes. The comprehensive federal regulations indicated that the federal government had preempted this area and that trade with the Indians was covered by the Act and that the imposition of a sales tax would interfere with the congressional purpose of the Buck Act and would be permitting an additional burden upon Indian traders with Indians on reservations. The court focused on the proposition that the trader would be burdened, not that the Indians may be burdened.

In the present instance, we are not concerned with the application of the Buck Act. We are also informed that no retailer in the city of New Town is presently holding a trader's license stamp or any other authority to do business in that area even though it is within the geographic boundaries of the Fort Berthold Reservation.

In the case of Mescalero Apache Tribe v. Franklin Jones, 489 P. 2d. 666 (decided on August 6, 1971, certiorari denied October 6, 1971), the court of New Mexico was confronted with the question whether or not materials used to construct ski lifts being operated by the Mescalero Apache Tribe outside of the reservation were subject to the emergency school tax imposed by the state of New Mexico. The ski lift was on United States Forest Service property but was not a part of the tribe's reservation. The court held that such sales were subject to the tax.

After having considered the constitutional provision the laws of this state and the case law as expressed by the various courts, we come to the conclusion that a sales tax may legally be imposed and collected from sales to Indians. On such basis, we will answer the questions you submitted. We, however, wish to point out that penalties exist

for not complying with the Sales Tax Act under Section 57-39.2-18 and that while the state may not, in some instances, have jurisdiction to enforce its own laws, nevertheless, its laws can be enforced by the federal government pursuant to the provisions of 18 USCA 13 and the annotations thereunder. Thus, while the state may not directly enforce its Sales Tax Act, nevertheless, the federal government under the aforementioned statutory provisions may enforce the Act for the state.

As to question 1(a) and 1(b), the answer is that the retailer is required to charge the retail sales tax and pay the tax to the state.

As to question 1(c), if the Indian tribe or band is an agency of the tribe, or band, in the same manner as agencies exist under the federal government, the answer is that the sales tax may not be imposed on such sales. The basis for this conclusion is that the tribe or band is actually the Indian tribe itself or an instrumentality. If, however, the purchases are made by someone else to be used for an Indian tribe project, then the exemption would not longer apply and the tax would be imposed. In this respect, we would treat the question in the same manner as instrumentalities of the United States government are treated.

As to question number 2, because of absence of any specific facts, we see no reason to make any distinction between deeded and trust lands.

As to question number 3, again we do not deem it necessary to distinguish between activities carried on on trust lands or on deeded lands for the same reason.

The same answer would apply to question number 4.

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